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No. 88-1526

In The

Supreme Court of the United States

October Term, 1988

TERRY ROGERS and BRENDA ROGERS,

Appellant,

v.

CHEYENNE AIRPORT BOARD
and CITY OF CHEYENNE,

Appellees.

On Appeal For A Writ Of Certiorari From The Decision Of The United States Court Of Appeals For The Tenth Circuit

APPELLEES BRIEF IN OPPOSITION TO THE PETITION

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DATE: April, 1989

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QUESTION PRESENTED

The question in this case is whether or not there exist reasons pursuant to Rule 17 of the Supreme Court Rules to grant certiorari in a case that has been twice previously heard and decided by the Supreme Court of the United States of America.

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ORDINANCES

Cheyenne Municipal Airport Zoning Ordinance 2

Pursuant to Rule 22, the appellees, Cheyenne Airport Board and the City of Cheyenne, file this their brief in opposition to the Petition for a Writ of Certiorari filed by Terry Rogers and Brenda Rogers on the ground that the appeal does not present a reason pursuant to Rule 17 justifying a review by this Court of the decision of the Tenth Circuit Court of Appeals as this case has previously been decided by the United States Supreme Court and, therefore, the reasons set forth in Rule 17 are not found.

STATUTORY PROVISIONS INVOLVED

The statutory provisions with regard to the underlying matters are contained in the appellants brief and are not herein enumerated as it is the position of appellee that they do not address the issue of grounds for accepting this case pursuant to Rule 17. It is the position of appellee that in the Petition for Writ of Certiorari the question is whether or not grounds exist justifying a review of the decision. It is, therefore, those grounds that are germain and not the underlying issues in a case that was dismissed by the Tenth Circuit as being precluded by the doctrines of res judicata.

STATEMENT

On April 12, 1984, Terry Rogers and Brenda Rogers brought an action in the First Judicial District Court of the State of Wyoming, praying that the Cheyenne Municipal Airport Zoning Ordinance be declared unconstitutional under the provisions of Article I, Section 7 of the

Wyoming Constitution and the Fifth and Fourteenth Amendments to the United States Constitution and for an injunction preventing enforcement of the ordinance. This Petition for Writ of Certiorari follows a long and tortured path of litigation which has resulted from that initial filing. The initial filing resulted in an appeal to the Supreme Court of the State of Wyoming in *Cheyenne Airport Board v. Rogers*, 707 P.2d 717 (Wyo. 1985). That decision was adverse to the Rogers and was then appealed to the United States Supreme Court and was dismissed at that level for lack of a substantial federal question at 476 U.S. 110, 106 S. Ct. 1961, 90 L.Ed.2d 647 (1986).

Not satisfied with the decision of the United States Supreme Court, the appellant continued to refuse to trim the Cottonwood tree, which is the subject of this entire litigation. The City of Cheyenne, pursuant to its zoning ordinance, therefore, prosecuted appellants pursuant to the Cheyenne Municipal Airport Zoning Ordinance. That left a trail of litigation again culminating with a dismissal before the United States Supreme Court.

Once again, appellants being unsatisfied with the decision of the United States Supreme Court sought redress in the Federal Court system by filing a § 1983 case with the United States District Court for the District of Wyoming which is the genesis of this appeal. The Federal District Court dismissed the action finding the previous decision of the United States Supreme Court to be res judicata. The case was then appealed to the Tenth Circuit, case #87-10099. The Tenth Circuit, on December 9, 1988, affirmed the decision of the United States District Court from which this petition resulted.

ARGUMENT

THIS CASE DOES NOT PRESENT A REASON PURSUANT TO RULE 17 JUSTIFYING ACCEPTANCE OF THE PETITION FOR WRIT OF CERTIORARI.

The petitioner attempts to create a Rule 17 reason by expanding the previous ruling beyond its scope. The petitioner says "the Court of Appeals has held, at least as applied to this case and all other cases with similar facts, that zoning ordinances which permit a physical invasion of private property and cause actual damages does not result a 'taking' ". That is an absolute misstatement of the holdings of the previous courts. In fact, the underlying decision from the Supreme Court of the State of Wyoming found that there was no taking as damage had not been shown pursuant to and under the guidelines of the previous Supreme Court cases. *See United States v. Causby*, 328 U.S. 256, 266 (1946), *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84 (1962). None of the courts that have heard this case have attempted to expand it beyond its own parameters. As must be the case in all zoning questions, the resolution of the issue of a taking must be done on a case by case basis. That was done in the initial litigation and this Court has already reviewed that issue as the State of Wyoming Supreme Court case which so decided was reviewed by this Court and dismissed for lack of a substantial federal question. *Cheyenne Airport Board v. Rogers*, 707 P.2d at 717 (Wyo. 1985), appeal dismissed, 476 U.S. 110, 106 S.Ct. 1061, 90 L.ED.2d 647 (1986). Therefore, the petitioner has attempted to expand the decisions of the various previous courts beyond their scope in an effort to find the reason to justify acceptance under Rule 17. However, this attempted expansion does not change the rulings which are attached to the petition,

which on their face do not take the issues between the parties to the scope argued by the petitioners.

The petitioners further argue that their failure to apply for a variance protects them from the previous decision of this Court as the issues were not right at the time they were heard in the previous litigation before the United States Supreme Court. This argument is unfounded as that issue was before the United States Supreme Court in the previous litigation and it does not provide a reason for granting a Writ of Certiorari pursuant to Rule 17.

CONCLUSION

The United States Supreme Court should not grant the Petition for Writ of Certiorari as reasons do not exist pursuant to Rule 17 for granting the same. The petitioners attempted expansion of the rulings of the United States District Court and Tenth Circuit are not justified by the decisions themselves and there is no conflict between this and other decisions which would warrant granting of the writ. The petition should be denied.

Respectfully submitted,

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